

1997

# Josie Ann Gunderson v. The May Department Stores Company, Payless Shoe Source, Inc. : Reply Brief

Utah Court of Appeals

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**BRIEF**

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IN THE UTAH COURT OF APPEALS

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JOSIE ANN GUNDERSON,	:	Case No. 970178
	:	
Plaintiff/Appellant,	:	Category 15
	:	
-vs-	:	
	:	Civil No. 940901812
THE MAY DEPARTMENT STORES	:	
COMPANY, a New York corporation:	:	
and PAYLESS SHOESOURCE, INC.,	:	
a Missouri corporation,	:	
	:	
Defendants/Appellees.	:	

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**REPLY BRIEF OF APPELLANT**

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**APPEAL FROM FINAL JUDGMENT OF THE THIRD JUDICIAL  
DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE LESLIE LEWIS PRESIDING**

---

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**COURT OF APPEALS**

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## ARGUMENT

### POINT I

#### AT THE TIME OF THE INJURY COMPLAINED OF IN PLAINTIFF'S COMPLAINT (TORTS OF BAD FAITH AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS) PLAINTIFF WAS NOT AN EMPLOYEE OF DEFENDANTS

In its reply brief, defendants argue that the Plaintiff could not maintain an action against them because the Plaintiff was their employee and, thus, barred by the Utah worker's compensation statute. U.C.A. §35-1-60.

However, at the time that the torts of bad faith and negligent infliction of emotional distress arose Plaintiff was no longer employed by the Defendants. (¶5, Appellant's Statement of Facts, Appellant's Brief).

In their argument to the Court of Appeals, Defendant's totally ignore the fact that, at the time the torts complained of arose, Plaintiff was no longer an employee of the Defendants and, therefore, no longer covered under the Utah worker's compensation statute exclusivity provision.

### POINT II

#### PLAINTIFF HAD NO GUARANTEE THAT DEFENDANT WOULD COMPLY WITH ORDERS OF THE UTAH INDUSTRIAL COMMISSION

Defendants argue that the Industrial Commission had continuing jurisdiction over the claims of the Plaintiff and it would have been a simple matter to go back to the

Commission and to have the Commission order that the Defendant's comply with the previous order of the Commission.

However, in this case, the Plaintiff **already had an order** from the Commission (which order the Defendant's attorney wrote) and which order the Defendant's were ignoring. (¶¶15-22, Appellant's Statement of Facts, Appellant's Brief; R. 224-225, 243-262).

If the Defendant's had complied with the Order of the Commission in the first place, the Plaintiff would have had no necessity to bring an action against the Defendants.

It was reasonable for the Plaintiff to assume that if the Defendant's were going to ignore one Order of the Commission (which Defendant's attorney wrote), they would ignore others.

### POINT III

#### **PLAINTIFF HAD PRIVACY OF CONTRACT WITH THESE DEFENDANTS AND, THEREFORE, COULD MAINTAIN A CAUSE OF ACTION FOR BAD FAITH**

Defendant's argue that Plaintiff had no privacy of contract with them and therefore, under the rational of Savage v. Educator's Insurance Co., 908 P.2d 862 (Utah 1995), she could not bring an action for bad faith against them.

However, Defendant's argument ignores the facts of the corporate structure of the Defendants and the Plaintiff relationship with them. In this case, Payless ShoeSource, Inc. is a wholly owned subsidiary of May Department Stores Company which, in turn, has as part of it the Western Region Claims office, which administers May's self-insured worker's compensation insurance.

In this case, the Defendant's were the self-insurer for worker's compensation matters, the insured for such worker's compensation matters and the administrator of the worker's compensation insurance and claims. But, in addition to wearing all of those hats, and most importantly for this case, the Defendant's were also the employer of the Plaintiff. Through such employment of the Plaintiff by the Defendant's, Plaintiff had privity of contract with the Defendant's.

Defendant's argument, therefore, misapplies Savage.

Defendant's should not be allowed to take the economic advantage of being the insurer, the self-insured and the self-administer of their worker's compensation insurance (wear all of the hats) and then also get the advantage of saying that there is no privity of contract as an employer when there is clearly such privity with this Plaintiff.

In any event, the facts in this case are clearly different than the facts set forth in Savage. In Savage,



Granite school district was the insured. Savage worked for the school district. The school district hired Educator's Insurance Co. as the insurer and the administrator of the district's worker's compensation insurance. Educator's was a distinct entity from Granite school district. There was no privity between Savage and Educator's in Savage. Such is not the case in this matter.

#### POINT IV

#### EMOTIONAL DISTRESS ALONE, WITHOUT PHYSICAL INJURY, IS ENOUGH TO RAISE A CAUSE OF ACTION UNDER UTAH LAW

In Hansen v. Mountain Fuel Supply Co., 858 P.2d 970 (Utah 1993), Justice Durham notes that the plaintiff's themselves inhaled asbestos. However, Justice Durham also notes that:

"In some cases, a plaintiff may be eligible to recover for NIED although no one in the case was subject to bodily harm. (Citation omitted) In that event, a foreseeability test as outlined in subsection (1) of section 313 [Restatement (Second) of Torts] would be appropriate to evaluate liability. . . . I would leave to a future case the parameters of a pure foreseeability test, but I note that such a test is appropriate under subsection (1). (Emphasis added)

Id. at fn. 4, p. 974.

In Hansen, Justice Durham was careful to note that the language of §313 of the Restatement (Second) of Torts allows

recovery for "illness or bodily harm". (Emphasis Justice Durham's). As she stated in Hansen,

The drafters' use of "or" rather than "and" shows an intention to allow plaintiff to recover not only where bodily harm results from emotional trauma, but where "illness" results as well. "Illness" is "an unhealthy condition of body or mind" Webster's New Collegiate Dictionary 566 (1981). From this we conclude that either physical or mental illness may support the NIED cause of action.

Id. at 975.

### CONCLUSION

Because Plaintiff was not, at the time the torts of bad faith and negligent infliction of emotional distress arose, an employee of the Defendant's the exclusivity provision of the Utah worker's compensation statute does not come into play.

Plaintiff had not guarantee that Defendant's would obey a further order of the Utah Industrial Commission when the Defendant's had already chosen to ignore or disobey the initial order of the Commission.

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<sup>1</sup> Section 3131 provides:

(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor

(a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise then by knowledge of the harm or peril of a third person, and

(b) from the facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

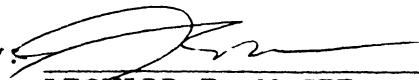
Plaintiff, as the employee of the Defendant's, was in privity of contract such that she could raise a claim of bad faith against her self-insured, self-administering employer.

Utah law allows a claim for negligent infliction of emotional distress based solely upon mental anguish, without need for a showing of physical harm or injury.

The Court should reverse the summary judgment granted by the court below and return the matter for trial.

DATED this 15th day of September, 1997.

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By:   
LEONARD E. MCGEE

**CERTIFICATE OF MAILING**

I hereby certify that a true and correct copy of Appellant's Reply Brief was hand-delivered, this 15th day of September, 1997, to the following counsel of record:

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